No. 4065 7

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. O. HARRISON CO. (a corporation),
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

REDMAN & ALEXANDER,
Attorneys for Plaintiff in Error.

FILED
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F. D. MONCKTON

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The trial court held (Trans. p. 17), first, that a vendor under a conditional sale contract is not such an "owner" that he can show "good cause" to prevent the sale of a seized automobile and secure its return; and, second, that such a vendor has no "lien" upon the car and therefore cannot be protected with respect to his unpaid balance out of the proceeds of the sale of the car. In other words, that because a conditional vendor is not mentioned in the statute he cannot qualify as "owner" nor as "lienor" and therefor is without rights although he is an innocent party.

Under such a view a situation might arise where no person interested in the seized automobile could assert his rights under Section 26 of the Prohibition

Act. For example: A sells a car to B under a conditional sales contract. C steals it from B and while using it in violation of the Prohibition Act it is seized by the Government. B cannot show "good cause" to prevent a sale because he is not the "owner"—A is the "owner". But A as such "owner" cannot, under the view taken by the trial court, show "good cause" to prevent a sale and compel a return of the car; nor are A and B entitled to a lien upon the proceeds of the sale because they are not technically "lienors." The result is that although both A and B are innocent interested parties and the wrongdoer has no interest in the car, the Government will nevertheless sell the car and confiscate the proceeds! Of course, Congress did not intend that such a palpable injustice should be perpetrated.

Counsel concedes that the trial court's view works a manifest injustice for at page 14 of his brief he says:

> "We do not dispute that there may be cases where the ownership of the car is so divided among guilty and innocent persons that the court in its discretion could frame procedure so as to deal justly with the situation."

Counsel concedes the justice of protecting a conditional vendor but he suggests that it should be accomplished in some way other than by the procedure adopted by plaintiff in error in this case.

We accepted the views of Mr. Justice Rudkin as the sound exposition of the law and in accordance

with the decisions rendered by him in the *Smith* and *Tucker* cases we did not ask for the return of the car as "owner" thereof, our understanding being that as our status was not that of a *full* owner but only a vendor without right to the possession of the car, we could not recover more than the unpaid balance of the purchase price. According to the view expressed by Judge Rudkin, a vendor under a conditional sale contract occupies a different position from that of a statutory "owner", as, for example, one who gives permission to another to use his automobile. The law requires such an "owner" to show good cause why the automobile should not be ordered sold, but under the decisions rendered by Judge Rudkin it matters not what "good cause" might be shown *by a vendor.* In no case would he be permitted to recover the *entire* automobile but he is *reduced to the position of a mere lienor.* It was in deference to the views expressed by Judge Rudkin, which appeared to us to be an equitable and sound construction of the statute that we proceeded in the manner that we did. Technically we were the "owner" but not equitably nor substantially, and this being so, we asked for the application of the rule laid down by Judge Rudkin in his decisions. But if we were entitled to more than we asked for, that is no reason why justice should not be done in this case. If it be true that we were entitled to the *return* of the car, regardless of the fact that we were a mere vendor, assuredly this court will not sustain a decree refus-

ing to award to us *less* than we were justly entitled to. This of course would be a manifest and gross injustice.

The statute provides for a sale of the seized vehicle unless good cause to the contrary is shown by the "owner". If the conditional vendor is the "owner" contemplated by the statute, what "good cause" could he show to prevent a sale if the unpaid balance due him were less than the amount which a sale would realize? Clearly none, according to the decisions rendered by Judge Rudkin. It follows therefore that he should be permitted *after the order of sale,* to show his interest, his lack of knowledge that the vehicle was being used for the illegal transportation of liquor and be permitted to participate in the proceeds of the sale to the extent of his interest in accordance with the true spirit of the statute as interpreted by Judge Rudkin.

It is intimated in the brief of plaintiff in error that the provision in the contract requiring the vendee to protect the vendor by insuring against confiscation indicates that the vendor suspected that the automobile would be used in violation of the National Prohibition Act. This suggestion is without foundation. There is no significance whatever attaching to such clause which is found in all conditional sale contracts, the reason therefor being that vendors are without power or authority to control *the use* of the automobiles by the vendees—the *equitable owners* thereof. The clause merely provides for

protection against a *possible contingency,* not against an event which the vendor anticipates.

Nor was there any showing that this provision of the contract had been complied with by the vendee in this case, the truth being that the vendor waived compliance with it (as is often done) which is established by the fact that the application was made by the vendor in its own behalf and not by nor in the interest of an insurance company.

Dated, San Francisco,
January 2, 1924.

Respectfully submitted,
REDMAN & ALEXANDER,
Attorneys for Plaintiff in Error.